No. 04-0112

In the Supreme Court of Texas

IN RE: THE COMMITMENT OF MICHAEL FISHER

On Petition for Review from the
Thirteenth Court of Appeals at Corpus Christi, Texas

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case:	This is an appeal of a civil-commitment determination under the Texas Civil Commitment of Sexually Violent Predators Act. *See* TEX. HEALTH & SAFETY CODE §§841.001-.150 (App. A).
Trial Court:	The Honorable P.K. Reiter, 284th Judicial District Court, Montgomery County, Texas.
Trial Court Disposition:	The trial court entered judgment committing Fisher to treatment and supervision by the Council on Sex Offender Treatment (App. B).
Parties in Court of Appeals:	Michael Fisher, Appellant. State of Texas, Appellee.
Court of Appeals:	Thirteenth Court of Appeals, Corpus Christi-Edinburg; en banc opinion by Wittig, J. (retired) with Castillo, J., dissenting. *Commitment of Fisher v. State of Texas*, 123 S.W.3d 828 (Tex. App.—Corpus Christi 2003, pet. granted) (App. C).
Court of Appeals's Disposition:	Reversed and remanded.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal because the court of appeals's determination that the Texas Civil Commitment of Sexually Violent Predators Act is unconstitutional affects the jurisprudence of the State and requires correction, *see* TEX. GOV'T CODE §22.001(a)(6), the justices of the court of appeals disagreed on a question of law material to the decision, *see id.* §22.001(a)(1), the court of appeals held differently from another court of appeals on a question of law material to the decision, *see id.* §22.001(a)(2), and this case involves the construction and validity of a statute, *see id.* §22.001(a)(3).

ISSUES PRESENTED

1. Is the Texas Civil Commitment of Sexually Violent Predators Act punitive?

2. Does due process require an individual to be competent to understand the nature of a civil-commitment proceeding against him and be able to assist his counsel in such a proceeding?

3. Was the State's commitment of Respondent Michael Fisher unconstitutional on Fifth Amendment or vagueness grounds?

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Corpus Christi Court of Appeals's holding that the Texas Civil Commitment of Sexually Violent Predators Act is unconstitutional contravenes precedent from the United States Supreme Court and every other court in the nation that has addressed the issues presented in this case. In addition, the court of appeals's opinion fundamentally misconceives the duty and authority of sovereign governments to protect citizens from dangerous individuals and to treat and care for persons who are unable to care for themselves. Accordingly, the Court should reverse the judgment of the court of appeals and render judgment affirming the trial court's commitment of Respondent Michael Fisher to outpatient treatment and supervision under Texas's sexual-predator civil-commitment statute.

STATEMENT OF FACTS

Civil-commitment statutes aimed at treating recidivist sexual predators have a long history in the United States. *See Martin v. Reinstein*, 987 P.2d 779, 790-91 (Ariz. Ct. App. 1999). As early as the 1930s, for example, many States passed civil-commitment statutes known as "sexual psychopath laws" to treat violent sexual offenders. *Id.* (citing Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 897-98 (1995); *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274 (1940)). The objectives of these statutes included protecting society from dangerous sexual predators and providing treatment and rehabilitation to sexual predators. *See Martin*, 987 P.2d at 791 (citing V. Woerner, Annotation, *Statutes Relating to Sexual Psychopaths*, 24 A.L.R.2d 350, 351 (1952)).

By 1990, many of the States that had enacted sexual psychopath statutes repealed their statutes "as part of a trend to punish rather than to treat offenders." *Martin*, 987 P.2d at 791 (citing Blacher, 46 MERCER L. REV at 906-07). More recently, however, state legislatures have exhibited a renewed interest in the civil commitment of sexual predators. *See, e.g., Martin*, 987 P.2d at 791. In 1999, the Texas Legislature adopted the Texas Civil Commitment of Sexually Violent Predators Act, joining the growing number of States

enacting civil-commitment statutes for repeat sexual predators. *See* TEX. HEALTH & SAFETY CODE §§841.001-.150.[1]

I. THE CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS ACT

The Texas Civil Commitment of Sexually Violent Predators Act creates a system of outpatient treatment and supervision for a "small but extremely dangerous group of sexually violent predators." TEX. HEALTH & SAFETY CODE §841.001. The Act targets "those predators [who] have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence." *Id.*[2] Notably, Texas's sexual-predator statute does not,

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1. *See also* ARIZ. REV. STAT. ANN. §§36-3701 - 17 (West 2004); CAL. WELF. & INST. CODE §§6600-6609.3 (West 2004); FLA. STAT. ANN. §§394.910-.931 (West 2004); 725 ILL. COMP. STAT. ANN. 207/1-99 (West 2004); IOWA CODE ANN. §§229A.1-.16 (West 2004); KAN. STAT. ANN. §§59-29a01 - 21 (2004); MASS. GEN. LAWS ch. 123A, §§1-16 (West 2004); MINN. STAT. ANN. §§253B.185(1)-(7) (West 2004); MO. ANN. STAT. §§632.480-.513 (West 2004); N.J. STAT. ANN. §§30:4-27.1 - .38 (West 2004); N.D. CENT. CODE §§25-03.3-01 - 23 (2004); 42 PA. CONS. STAT. ANN. §§6401-6409 (West 2004); S.C. CODE ANN. §§44-48-10 - 170 (Law Co-op. 2003); VA. CODE ANN. §§37.1-70.1 - .19 (West 2004); WASH. REV. CODE ANN. §§71.09.010 - .902 (West 2004); WIS. STAT. ANN. §§980.01-.12 (West 2004).

2. Texas Health and Safety Code §841.001 details the "Legislative Findings" regarding the Act. The provision states:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence. The legislature finds that the existing involuntary commitment provisions of Subtitle C, Title 7, are inadequate to address the risk of repeated predatory behavior that sexually violent predators pose to society. The legislature further finds that treatment modalities for sexually violent predators are different from the traditional treatment modalities for persons appropriate for involuntary commitment under Subtitle C, Title 7. Thus, the legislature finds that a civil commitment procedure for the long-

as its name might suggest, create a process by which the State physically confines sexually violent predators. Instead, the Act prescribes only outpatient treatment and supervision of sexually violent predators. *Id.* §841.081.

The Act establishes a multi-step process for identifying, treating, and discontinuing the supervision of Texas's sexually violent predators. First, a confidential screening process identifies potential candidates for sexual-predator status. *See id.* §§841.021-.023. The Texas Department of Criminal Justice and the Texas Department of Mental Health and Mental Retardation identify possible sexually violent predators among persons scheduled to be released from their custody. *Id.* §841.021. Next, a screening team, called the Multidisciplinary Team, reviews available records of referred persons to determine whether to recommend that a person be assessed for sexual-predator status. *Id.* §841.022. If recommended, an assessment is then conducted by one of the two Departments, aided by an expert, to determine whether to recommend that a state attorney file a Petition Alleging Predator Status. *Id.* §841.023. If such a recommendation is made, the state attorney[3] has discretion to file a petition. *Id.* §841.041.

> term supervision and treatment of sexually violent predators is necessary and in the interest of the state.

TEX. HEALTH & SAFETY CODE §841.001.

3. The Act creates a division of state attorneys to prosecute civil-commitment cases involving sexually violent predators. *See* TEX. HEALTH & SAFETY CODE §841.004. The Act states, "[a] special division of the prison prosecution unit, separate from that part of the unit responsible for prosecuting criminal cases, is responsible for initiating and pursuing a civil commitment proceeding under this chapter." *Id.*

The filing of a Petition Alleging Predator Status commences the adversarial process to determine whether someone is a sexually violent predator under the Act. *Id.* §841.041. Once the petition is filed, the district court has 270 days to "conduct a trial to determine whether the person is a sexually violent predator." *Id.* §841.061(a). The person is entitled to a jury trial on demand and an "immediate" examination by an expert. *Id.* §§841.061(b), (c). The person also has the right to appear at the trial, to present evidence on his own behalf, to cross-examine witnesses, and to view and copy all petitions and reports in the court file. *Id.* §§841.061(d)(1)-(4). The Act also provides counsel to represent persons subject to civil-commitment proceedings. *Id.* §§841.005, .144.

After the trial, the judge or jury determines "whether, beyond a reasonable doubt, the person is a sexually violent predator." *Id.* §841.062(a). To determine that a person is a sexually violent predator, the fact-finder must conclude that the person (1) is a repeat sexually violent offender, and (2) "suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence." *Id.* §841.003(a).[4] A jury's

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4. Section 841.003(b) describes the requirements for finding that a person is a "repeat sexually violent offender." The provision states:

> A person is a repeat sexually violent offender for purposes of this chapter if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses or if:
>
> (1) the person:
>
> (A) is convicted of a sexually violent offense, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the person was subsequently discharged from community supervision;
>
> (B) enters a plea of guilty or nolo contendere for a sexually violent

verdict must be unanimous, *id.* §841.062(b), and either party can appeal the fact-finder's determination, *id.* §841.062(a).

If the judge or jury determines that the person is a sexually violent predator, the district court "shall commit the person for outpatient treatment and supervision to be coordinated by the case manager." *Id.* §841.081. Outpatient treatment and supervision begin after the person's release from either the Department of Criminal Justice or the Department of Mental Health and Mental Retardation. *Id.*

Persons subject to outpatient treatment and supervision under the Act must comply with a number of requirements, including restrictions on residential locations, prohibitions on contact with victims, prohibitions on the use of alcohol or controlled substances, and mandatory treatment programs. *Id.* §§841.082(a)(1)-(4). Persons found to be sexually violent predators may also be required to wear tracking devices, may be restricted from areas

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> offense in return for a grant of deferred adjudication;
> (C) is adjudged not guilty by reason of insanity of a sexually violent offense; or
> (D) is adjudicated by a juvenile court as having engaged in delinquent conduct constituting a sexually violent offense and is committed to the Texas Youth Commission under Section 54.04(d)(3) or (m), Family Code; and
> (2) after the date on which under Subdivision (1) the person is convicted, receives a grant of deferred adjudication, is adjudged not guilty by reason of insanity, or is adjudicated by a juvenile court as having engaged in delinquent conduct, the person commits a sexually violent offense for which the person:
> (A) is convicted, but only if the sentence for the offense is imposed; or
> (B) is adjudged not guilty by reason of insanity.

TEX. HEALTH & SAFETY CODE §841.003(b).

where children are accessible, and must notify their case manager of changes that may affect their treatment or supervision. *Id.* §§841.082(a)(5)-(8).[5] Treatment plans are developed for each predator, and may include the use of polygraph examinations. *Id.* §841.083(a). The Act also authorizes the trial court to impose additional conditions of supervision or treatment. *Id.* §841.082(a)(9).

The Act mandates a biennial examination and review to determine whether the conditions imposed on a person should be modified and whether the person no longer meets the requirements for sexual-predator status. *Id.* §§841.101, .102. The sexual predator is entitled to be represented by counsel at the biennial review. *Id.* §841.102(b). If the judge determines that probable cause exists to believe the person is no longer likely to engage in a predatory act of sexual violence, the judge must set a hearing, at which the predator is entitled to all protections provided during the initial civil-commitment proceeding. *Id.* §§841.102(c)(2), .103(c). "The burden of proof at the hearing is on the State to prove beyond a reasonable doubt that the person's behavioral abnormality has not changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence." *Id.* §841.103(c).

In addition to the biennial review, the predator's case manager may authorize the offender to petition the court for his own release from treatment and supervision. *Id.* §841.121(a). Once the case manager files such a petition, the court must hold a hearing on

5. Violating a requirement imposed by §841.082 of the Act is a third-degree felony. *Id.* §841.085.

the matter. *Id.* §841.121(c). At the hearing, the State must prove, beyond a reasonable doubt, that the person's behavioral abnormality has not changed such that the person is no longer likely to engage in a predatory act of sexual violence. *Id.* §841.121(e).

The predator may also petition for release without the case manager's authorization. *Id.* §§841.122, .123. If probable cause exists to believe that the person is no longer likely to engage in a predatory act of sexual violence, the judge must conduct a hearing on the petition. *Id.* §§841.123(d), .124(a). At the petitioner's request, the hearing can be before a jury. *Id.* §841.124(c). Again, the State must prove, beyond a reasonable doubt, that the person's behavioral abnormality has not changed such that the person is no longer likely to engage in a predatory act of sexual violence. *Id.* §841.124(c).

II. MICHAEL FISHER AND HIS CONSTITUTIONAL CHALLENGE

The State of Texas began sexual-predator civil-commitment proceedings against Respondent Michael Fisher on October 25, 2000. CR.4-7. Fisher requested a competency hearing prior to his sexual-predator commitment proceedings, but the trial court denied Fisher's request because the Act does not provide for such a hearing. Mot.R.4.[6]

At trial, the State presented evidence of Fisher's sexual deviancy, dangerousness, and lack of control. For example, Fisher's medical history indicated instances of extraordinary violence and aggression. 3.RR.235-36. Fisher was twice convicted on charges of rape. 3.RR.136, 149, 189. While at the Rusk State Hospital in a secured unit, Fisher "tried to kick

6. One volume of the Record, entitled "Motions," was not assigned a volume number. Pages of this volume are identified as "Mot.R.[page number]."

out a window," "threatened to beat an officer to death," and "threatened to kill and strangle and rape a nurse." 3.RR.228. Forensic psychologist Dr. Lisa Clayton testified that Fisher's behavior was comparable to a "truck going down a hill with no brakes," saying,

> Mr. Fisher has a type of schizophrenia . . . . [H]e gets very agitated and violent . . . and just totally out of control. And . . . as he gets more psychotic he picks up speed and violence and aggression.

3.RR.235-36.

Fisher is mildly to moderately retarded and suffers from paranoid schizophrenia. 3.RR.30-31, 123, 151, 223, 228-29; 4.RR.12, 56, 68. He is described as out-of-control, delusional, and predatory. 3.RR.223, 235; 4.RR.28. Notwithstanding these characteristics, experts testified that Fisher could benefit from counseling and supervision. 3.RR.135, 244.

The trial court entered judgment on the jury's verdict that Fisher was a sexually violent predator under the Act. CR.15-30. Fisher appealed his conviction to the Corpus Christi Court of Appeals, arguing that the Act is punitive and cannot be constitutionally applied to a mentally incompetent individual. *See* Appellant's Br. at 7-17. The court of appeals agreed, reversing Fisher's commitment to treatment and supervision. *See Commitment of Fisher*, 123 S.W.3d at 850-51. The State of Texas then filed a petition for review, which this Court granted.

SUMMARY OF THE ARGUMENT

The decision of the Corpus Christi Court of Appeals striking down the Texas Civil Commitment of Sexually Violent Predators Act contravenes clear precedent from the United States Supreme Court and every other court to have addressed the issues presented in this case. Alone in the nation, the court of appeals found two constitutional infirmities with civil commitment for sexual predators: first, the court of appeals determined that the Act was criminal, not civil, in nature, and second, the court held that due process protections preclude the civil commitment of incompetent individuals. Both conclusions were in error.

In *Kansas v. Hendricks*, 521 U.S. 346 (1997) (App. D), the Supreme Court considered Kansas's sexual-predator civil-commitment statute and squarely held that the statute was civil, not criminal. Given that the Kansas statute was far more severe than Texas's—providing for full incarceration in a penitentiary rather than mere outpatient monitoring and treatment, as under the Texas statute—it follows that the Texas statute is likewise civil, not criminal. Moreover, the thirteen States that have considered challenges to their sexual-predator civil-commitment statutes have held that they are civil rather than punitive. Florida, Massachusetts, Arizona, Missouri, Wisconsin, South Carolina, Iowa, Illinois, Minnesota, California, North Dakota, Kansas, and Washington are all in accord. Texas should not disregard that national consensus, and the court of appeals erred when it did so.

The court of appeals's second holding—that due process does not permit the civil commitment of incompetent persons—is likewise without basis in law. No court has so held, and it runs counter to the very purpose of civil-commitment statutes. Indeed, sovereign governments have both the authority and responsibility to treat mentally ill individuals, and to protect their citizens from the dangers posed by violent mentally ill offenders. The court of appeals's conclusion—that persons cannot be committed to treatment and supervision for a mental deficiency *because* of the very fact that they have a mental deficiency—is counterintuitive and unsupported by authority.

The Court should also address and reject Respondent Michael Fisher's challenges to his civil commitment that were not reached by the court of appeals. Fisher's assertion that his civil-commitment testimony violated his Fifth Amendment right to refuse to testify must be rejected because, as the United States Supreme Court has held, such a privilege does not extend to civil proceedings. And Fisher's vagueness challenges to the civil-commitment statute and to his commitment restrictions must fail because they were not presented to the trial court and do not present a live case or controversy.

ARGUMENT

It is axiomatic that courts should declare legislative enactments unconstitutional only when it is "absolutely necessary to so hold." *Ex parte Ullmann*, 616 S.W.2d 278, 281 (Tex. Civ. App.—San Antonio 1981, writ dism'd) (citing *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450 (1945)). Courts must presume that a statute is constitutional. *See Tex. Pub.*

Bldg. Auth. v. Mattox, 686 S.W.2d 924, 927 (Tex. 1985) (orig. proceeding). As a consequence, litigants challenging the constitutionality of statutes face the heaviest of legal burdens. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully."). This presumption of constitutionality is especially difficult to overcome in the civil-commitment context, an area described by the United States Supreme Court as one of "unusual delicacy, . . . an area where professional judgments regarding desirable procedures are constantly and rapidly changing. In such a context, restraint is appropriate on the part of courts called upon to adjudicate whether a particular procedural scheme is adequate under the Constitution." *Heller v. Doe*, 509 U.S. 312, 333 (1993) (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 855-86 (1977)).

Despite the weighty burden placed upon Respondent Michael Fisher's constitutional challenge to the Texas Civil Commitment of Sexually Violent Predators Act, the Corpus Christi Court of Appeals broke new legal ground, holding that constitutional safeguards preclude the involuntary commitment of mentally incompetent individuals. *See Fisher*, 123 S.W.3d at 834-50. Because the court of appeals's conclusion is contrary to the determinations of the United States Supreme Court and every other court that has addressed these issues, the Court should reverse the court of appeals's judgment, reject Fisher's alternative arguments for challenging his civil commitment, and render judgment affirming the trial court's commitment of Fisher to outpatient treatment and supervision.

I. CONSTITUTIONAL SAFEGUARDS DO NOT PRECLUDE THE STATE FROM COMMITTING A MENTALLY INCOMPETENT SEXUAL PREDATOR TO OUTPATIENT SUPERVISION AND TREATMENT.

The court of appeals held that the commitment of mentally incompetent individuals under Texas's sexual-predator civil-commitment statute is unconstitutional for two reasons. First, the court determined that a person must be competent to be civilly committed under the Act because, according to the court, the Act is criminal and punitive in nature, not civil. *See Fisher*, 123 S.W.3d at 838-50. Second, the court concluded that the civil commitment of incompetent individuals violates due-process protections. *Id.* at 834-38. These determinations are unsupported by authority and directly contravene United States Supreme Court precedent.

A. The Texas Civil Commitment of Sexually Violent Predators Act Is Civil, Not Punitive.

The court of appeals's determination that Texas's sexual-predator civil-commitment statute is criminal in nature, *see Fisher*, 123 S.W.3d at 838-50, is contrary to precedent from the United States Supreme Court, this Court, and every other American court to have addressed the issue.

Commitment for treatment of recidivist sexual predators has long "been considered a *civil* solution to the difficult problems surrounding mental health treatment." *Martin*, 987 P.2d at 790 (emphasis added) (citing *Allen v. Illinois*, 478 U.S. 364, 369 (1986); *Hubbart v. Superior Court*, 969 P.2d 584, 607 (Cal. 1999) (noting that civil-commitment is a "legitimate non-punitive governmental objective and has been historically so regarded") (citing

Hendricks, 521 U.S. at 363). Civil-commitment statutes for sexual offenders were passed as early as the 1930s "in an effort to treat recidivist sexual offenders rather than simply punishing them criminally." *Martin*, 987 P.2d at 790-91 (citing Blacher, 46 MERCER L. REV. at 897-98). In fact, the United States Supreme Court first upheld the constitutionality of a sexual-predator act in 1940. *See Minnesota ex rel. Pearson*, 309 U.S. at 272-77.

The court of appeals's conclusion that Texas's civil-commitment statute is criminal in nature is gravely undermined by the United States Supreme Court's longstanding determination that civil-commitment statutes are civil, not criminal. *See, e.g., Seling v. Young*, 531 U.S. 250, 261-67 (2001) (analyzing Washington's sexually violent predator statute as civil, not criminal); *Hendricks*, 521 U.S. at 360-71 (concluding that Kansas's sexual-predator civil-commitment act is civil, not criminal); *Allen*, 478 U.S. at 365-375 (concluding that Illinois's sexually violent predator statute is civil, not criminal); *Addington v. Texas*, 441 U.S. 418, 428 (1979) ("In a civil commitment[,] state power is not exercised in a punitive sense . . . . [A] civil commitment proceeding can in no sense be equated to a criminal prosecution."). Indeed, in the seminal case in the sexual-predator civil-commitment arena, the United States Supreme Court expressly rejected many of the arguments now advanced by Fisher, holding that Kansas's civil commitment of sexually violent predators statute is civil, not criminal. *See Hendricks*, 521 U.S. at 360-71.

With the exception of the Corpus Christi Court of Appeals, state courts have uniformly followed the United States Supreme Court's conclusion in *Hendricks*, holding that

civil-commitment statutes are civil rather than punitive in nature. *See, e.g., Westerheide v. State*, 831 So. 2d 93, 103 (Fla. 2002); *Commonwealth v. Bruno*, 735 N.E.2d 1222, 1231 (Mass. 2000); *Martin*, 987 P.2d 779 at 788.[7] Thirteen States have determined that their sexual-predator civil-commitment statutes are civil rather than punitive: Florida, Massachusetts, Arizona, Missouri, Wisconsin, South Carolina, Iowa, Illinois, Minnesota, California, North Dakota, Kansas, and Washington. *See supra* & n.7. None has determined that its statute is criminal in nature.

Moreover, both the Third and Ninth Courts of Appeals in Texas have also followed the United States Supreme Court's lead by concluding that Texas's sexual-predator civil-commitment statute is civil rather than punitive. *See In re Commitment of Browning*, 113 S.W.3d 851, 858 (Tex. App.—Austin 2003, pet. denied); *Beasley v. Molett*, 95 S.W.3d 590, 608 (Tex. App.—Beaumont 2002, pet. denied). And while this Court has not previously addressed whether Texas's sexual-predator civil-commitment statute is civil or punitive, the Court has clearly expressed its belief that civil-commitment statutes are fundamentally different from criminal statutes and, therefore, are not subject to the procedural requirements

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7. *See also, e.g., In the Matter of Gibson*, Nos. 25482 and 25689, 2004 WL 766115, at *2 (Mo. Ct. App. 2004); *In re the Commitment of Rachel*, 647 N.W.2d 762, 778 (Wis. 2002); *In the Matter of Matthews*, 550 S.E.2d 311, 316 (S.C. 2001); *In re Detention of Williams*, 628 N.W.2d 447, 451 (Iowa 2001) (en banc); *In re Detention of Garren*, 620 N.W.2d 275, 283 (Iowa 2000); *In re Detention of Samuelson*, 727 N.E.2d 228, 234-35 (Ill. 2000) (en banc); *In re Linehan*, 594 N.W.2d 867, 871-72 (Minn. 1999) (en banc); *Hubbart v. Superior Court*, 969 P.2d 584, 610 (Cal. 1999); *In the Interest of M.D.*, 598 N.W.2d 799, 806 (N.D. 1999); *In the matter of Hay*, 953 P.2d 666, 672-675 (Kan. 1998); *State v. Carpenter*, 541 N.W.2d 105, 112-13 (Wisc. 1995); *In re Young*, 857 P.2d 989, 996-1000 (Wash. 1993) (en banc), *superceded by statute on other grounds, as stated in In re Brooks,* 36 P.3d 1034 (Wash. 2001) (en banc).

of criminal statutes. *See State v. Turner*, 556 S.W.2d 563, 566 (Tex. 1977) ("We see several distinctions between civil commitment proceedings and criminal proceedings which justify [lesser procedural protections]."). Based on the long history of civil commitment being used as a civil mechanism for treating sexual predators and protecting society from mentally ill individuals, *see Martin*, 987 P.2d at 790, as well as the United States Supreme Court's unwavering conclusion that such statutes are civil in nature and this Court's recognition that civil-commitment statutes are fundamentally different from criminal statutes, the Court should hold that Texas's sexual-predator civil-commitment statute is civil in nature, not criminal.

In concluding that civil-commitment statutes are civil in nature, the United States Supreme Court in *Hendricks* made clear that the "categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.'" *Hendricks*, 521 U.S. at 361 (quoting *Allen*, 478 U.S. at 368).[8] Accordingly, courts should defer to the "stated intent" of lawmaking bodies when determining whether a statute is criminal or civil. *Id.* And only when a litigant has offered "the clearest proof" that a statutory scheme is criminal or punitive should a court reject a legislature's stated intent to create a civil statutory scheme. *See Hendricks,* 521 U.S. at 361.

In this case, the Texas Legislature could not have been more clear: it aimed to create a *civil*-commitment scheme to treat the State's mentally ill sexual offenders. *See* TEX.

8. *See also Browning*, 113 S.W.3d at 858-59; *Westerheide*, 831 So. 2d at 99-100; *Hubbart*, 969 P.2d at 605-06.

HEALTH & SAFETY CODE §841.001 ("[T]he legislature finds that a civil commitment procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state."). This Court should defer to the Legislature's clearly manifested "stated intent," and conclude that Texas's sexual-predator civil-commitment statute is civil, not criminal. *Cf. Hendricks*, 521 U.S. at 361.

Beyond the Legislature's clearly stated intent, other factors illuminated by the United States Supreme Court in *Hendricks* also militate in favor of a determination that Texas's civil-commitment statute is civil rather than punitive. For example, Texas's statute, like Kansas's, limits confinement to a small segment of particularly dangerous individuals, provides considerable procedural safeguards, does not place persons subject to civil commitment in the general prison population, recommends treatment for persons found to be sexually violent predators, and requires release from civil-commitment restrictions upon a showing that the person is no longer dangerous. *Compare Hendricks*, 521 U.S. at 368-69 *with* TEX. HEALTH & SAFETY CODE §§841.001-.150; *see also Allen*, 478 U.S. at 369-70 (concluding that Illinois's sexually violent predator statute is civil because "the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released").[9] Based on these criteria, the United States Supreme Court held that both Kansas's and Illinois's sexual-predator civil-commitment statutes were civil in nature. *See Hendricks*, 521 U.S. at 368-69;

9. Kansas's civil-commitment statute in force at the time of the *Hendricks* decision is attached at App. E. *See* KAN. STAT. ANN. §§59-29a01-17 (1996).

Allen, 478 U.S. at 369-70. For the same reasons, this Court should hold that Texas's statute is civil in nature.

In *Hendricks*, the United States Supreme Court also looked to the duration of commitment in determining whether statutes are civil or criminal. *See Hendricks*, 521 U.S. at 363. Like Kansas's statute, the supervision and treatment under Texas's statute has no specific duration; rather, it is tied to the predator's mental condition. *See* TEX. HEALTH & SAFETY CODE §§841.101-.103, .121-.124; *see Hendricks*, 521 U.S. at 363.[10] As the United States Supreme Court concluded, "[f]ar from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." *Hendricks*, 521 U.S. at 363-64. Thus, because the duration of a person's civil commitment is tied to the predator's current mental condition, Texas's Act is not aimed to punish past conduct. *Cf. Hendricks*, 521 U.S. at 363; *Martin*, 987 P.2d at 790.

Indeed, Texas's civil-commitment statute is considerably *less* restrictive than Kansas's statute deemed civil by the United States Supreme Court. *See Hendricks*, 521 U.S. 360-71; *compare* TEX. HEALTH & SAFETY CODE §§841.001-.150 *with* KAN. STAT. ANN. §§59-29a01-17 (1996) (App. E). For example, while Kansas's statute confines sexual predators committed under their statute to full custodial confinement in a Kansas penitentiary, *see* KAN. STAT. ANN. §59-29a07 (1996), Texas's statute provides only outpatient treatment and

10. *Accord Wisconsin v. Post*, 541 N.W.2d 115, 127-132 (Wisc. 1995); *Martin*, 987 P.2d at 790.

supervision of civilly committed sexual predators, *see* TEX. HEALTH & SAFETY CODE §841.081.

Because Texas's statute is less restrictive than Kansas's, it appears that even the dissenting Justices in *Hendricks* would hold that Texas's sexual-predator civil-commitment Act is civil rather than criminal. Writing for the dissent, Justice Breyer criticized Kansas's Act because it failed to offer treatment and did not provide alternatives less restrictive than full custodial commitment. *See Hendricks*, 521 U.S. at 377-78 (Breyer, J., dissenting). Texas's Act, on the other hand, satisfies both of Justice Breyer's concerns by providing treatment and refraining from committing persons to the State's full custodial care. *See* TEX. HEALTH & SAFETY CODE §841.081. Therefore, contrary to the court of appeals's holding, *see Fisher*, 123 S.W.3d at 845 ("[P]ersons committed under the Texas SVP are subject to conditions often more onerous than conventional civil commitment."), the restraint resulting from a person's civil commitment under Texas's Act is not excessive in relation to the non-punitive purposes of the Act. *See Browning*, 113 S.W.3d at 859; *cf. Martin*, 987 P.2d at 792. Indeed, although Fisher's liberty is restrained to some degree by the Act, "the intrusion is far less restrictive than if [he] were confined in a secure facility in Kansas. And yet the Supreme Court found commitment under the Kansas act to be civil in nature." *Browning*, 113 S.W.3d at 859 (citing *Hendricks*, 521 U.S. at 360-69); *cf. Turner*, 556 S.W.2d at 566 ("The mental patient's loss of liberty therefore is less severe than that suffered by the convicted criminal.").

Disregarding the overwhelming weight of precedent, the court of appeals erroneously determined that Texas's statute is punitive because, according to the court, only persons with a prior conviction of a sexually violent crime can be determined to be sexually violent predators under the Act. *See Fisher*, 123 S.W.3d at 841.[11] The United States Supreme Court has squarely rejected the court of appeals's conclusion on this point, instead holding that "antecedent conduct is received [in civil-commitment cases] not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior." *Allen*, 478 U.S. at 371. The Supreme Judicial Court of Massachusetts also has rejected the court of appeals's reasoning, concluding that the requirement that a person "must have been convicted of a sexual offense . . . only identifies and limits the class of persons subject to potential commitment"; it does not punish someone for a prior conviction. *Bruno*, 735 N.E.2d at 1229.[12] Because the use of prior criminal conduct in civil-commitment statutes is for evidentiary purposes and to narrow the category of persons committed under such statutes—not to punish prior criminal conduct—Texas's inclusion of prior criminal conduct

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11. In reality, a prior conviction is not always required. For example, the Act also allows civil commitment of persons who have been found not guilty by reason of insanity. *See* TEX. HEALTH & SAFETY CODE §841.003(b)(1)(c).

12. *See also Browning*, 113 S.W.3d at 860 ("[T]he primary purpose of requiring proof of prior convictions is evidentiary. In other words, a person's history of sexually violent conduct is highly relevant to whether he suffers from a behavioral abnormality making it difficult for him to control his impulses to commit sexually violent offenses."); *Westerheide*, 831 So. 2d at 100 (noting that sexual-predator civil-commitment statute does not seek retribution for past crimes, but "is based upon an individual's *current* mental state.") (emphasis original); *Hubbart*, 969 P.2d at 606-07 (noting that requirement of prior criminal conduct is for evidentiary purposes and does not indicate that the State is seeking retribution against sexual predators) (discussing *Hendricks*, 522 U.S. at 362).

as one mechanism for restricting the category of persons committed under its statute does not render the Act criminal rather than civil. *See Browning*, 113 S.W.3d at 860; *see also Martin*, 987 P.2d at 791.[13]

The court of appeals's analysis that the Act is entirely criminal in nature because violations of civil-commitment restrictions are felonies under the statute should also be rejected. *See Fisher*, 123 S.W.3d at 840; *see also* TEX. HEALTH & SAFETY CODE §841.085 (making the violation of a civil-commitment restriction a third-degree felony). Providing an enforcement mechanism for the civil-commitment restrictions does not inflict additional punishment on sexual predators for their past criminal conduct that made them eligible for sexual-predator commitment; instead, it encourages supervision and treatment under the program. *See Browning*, 113 S.W.3d at 861. And while the felony clause itself may be punitive in nature, the Legislature's inclusion of the provision in the civil-commitment statute does not transform the entire statute into a criminal one. *Id.* As the Third Court of Appeals

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13. Along the same lines, the court of appeals incorrectly held that the Act's requirement of a previous conviction effectively requires a finding of scienter and is therefore punitive. *See Fisher*, 123 S.W.3d at 843. This conclusion too is based on a false premise because a previous conviction is not an absolute prerequisite to civil commitment under the Act. *See* TEX. HEALTH & SAFETY CODE §841.003(b)(1)(c); *see also Browning*, 113 S.W.3d at 860. Moreover, the argument is legally incorrect because while an underlying conviction might require a finding of culpability, the Act itself does not require a finding of criminal intent. *See Browning*, 113 S.W.3d at 860; *see also Rodriguez v. State*, 93 S.W.3d 60, 73 (Tex. Crim. App. 2002) (concluding that finding of culpable mental state in underlying conviction did not result in conclusion that sex-offender registration statute was punitive because registration statute, on its face, did not require a culpable mental state). As such, any finding of culpability encompassed in prior convictions is incidental to and not determinative of commitment under the Act. *See Browning*, 113 S.W.3d at 861; *see also Hubbart*, 969 P.2d at 606-07 ("Even though prior criminal conduct was required for classification and commitment as a sexual predator, the statute did not 'affix culpability' or require a finding of 'criminal intent.'") (citing *Hendricks*, 521 U.S. at 362).

concluded, "The Texas statute and its scheme for outpatient treatment is significantly less severe than its Kansas counterpart that the Supreme Court has declared to be civil in nature." *Id.* (citing *Hendricks*, 521 U.S. at 360-69).

Moreover, Fisher's assertion that Texas's sexual-predator civil-commitment statute is the only state statute that incorporates criminal penalties, *see* Resp. to Pet. at 6-7, is factually incorrect. Sexual-predator civil-commitment statutes in Florida, Iowa, Minnesota, and Virginia impose some form of criminal liability for certain conduct. *See* FLA. STAT. ANN. §394.927(1) (West 2004) (creating second-degree felony for escaping or attempting to escape civil-commitment confinement); IOWA CODE ANN. §229A.5B(2) (West 2004) (imposing misdemeanor liability on persons who (1) leave or attempt to leave civil-commitment facilities without permission, (2) are absent "from a place where the person is required to be present, or (3) leave or attempt to leave the custody of civil-commitment personnel); MINN. STAT. ANN. §253B.23(3) (West 2004) (creating gross misdemeanor for filing false report causing civil commitment); VA. CODE ANN. §37.1-70.19 (West 2004) (creating felony for committed individual leaving state without permission of court). Yet no court in these States has held, as Fisher suggests, that the inclusion of such criminal-penalty clauses converts the entire civil-commitment scheme into a criminal statute. *See Westerheide v. State*, 831 So.2d 93, 99-103 (Fla. 2002) (concluding Florida's sexual-predator civil-commitment statute is civil); *In re Detention of Williams*, 628 N.W.2d 447, 451 (Iowa 2001) (en banc) (concluding Iowa's statute is civil); *In re Detention of Garren*, 620 N.W.2d 275,

283 (Iowa 2000) (en banc) (same); *In re Linehan*, 594 N.W.2d 867, 871-72 (Minn. 1999) (en banc) (concluding Minnesota's statute is civil).[14]

In addition, contrary to the court of appeals's conclusion, *see Fisher*, 123 S.W.3d at 840, the Act is not aimed at deterring future sexual predators. As the United States Supreme Court has concluded, persons pursued for civil commitment are "unlikely to be deterred by the threat of confinement" due to the nature of their mental condition. *Hendricks*, 521 U.S. at 362; *see also Bruno*, 735 N.E.2d 1231. As a result, the Court should not conclude that the Act is unfairly punitive. *See Martin*, 987 P.2d at 791; *see also Browning*, 113 S.W.3d at 861 ("[W]e note that any incidental, marginal deterrent effect of Texas's outpatient-treatment and monitoring scheme will necessarily be less than any deterrence effected by Kansas's scheme of confinement."). The Texas statute simply does not unconstitutionally "promote either of 'the traditional aims of punishment—retribution and deterrence.'" *Allen*, 478 U.S. at 370 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)); *see also Browning*, 113 S.W.3d at 859 ("The Texas statute does not implicate to any significant degree the two primary objectives of criminal punishment—deterrence and retribution.").

The Act's civil-commitment goals of incapacitation, segregation, and treatment of sexually violent offenders are legitimate ends of civil laws. *See Hendricks*, 521 U.S. at 365-66; *Jones v. United States*, 463 U.S. 354, 368 (1983); *Turner*, 556 S.W.2d at 566 (noting that treating mentally ill individuals and protecting the public from harm "are valid, necessary

14. This issue has not yet been addressed in a reported Virginia court opinion.

state objectives which should not be thwarted . . . ."). Based on the factors considered by the United States Supreme Court in *Hendricks* and *Allen*, as well as this Court's related analysis in *Turner*, the Court should conclude that Texas's sexual-predator civil-commitment statute is civil in nature, not punitive.[15]

B. Due-Process Guarantees Do Not Preclude States from Civilly Committing Mentally Incompetent Individuals.

The court of appeals's alternative holding—that Fisher's due-process rights were violated because he was not competent to aid his counsel or understand the nature of the commitment proceedings, *see Fisher*, 123 S.W.3d at 834-38—is also erroneous. Indeed, Fisher's assertion—and the court of appeals's holding—rests on the counterintuitive premise that persons cannot be committed to treatment and supervision for a mental deficiency *because* of the very fact that they have a mental deficiency. This proposition directly contravenes authority from the United States Supreme Court and every other American court that has addressed the issue. The court of appeals's judgment also contradicts the very purpose of civil commitment, and the historical duty of governments to care for mentally ill individuals. In short, due-process protections simply do not prevent governments from civilly committing mentally incompetent persons.

The court of appeals's erroneous judgment fails to recognize "the historical responsibility of the sovereign to care for those who are mentally incompetent." *Plain v.*

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15. Once a civil-commitment statute is deemed civil in nature, it cannot be held to be criminal as applied. *See Seling*, 531 U.S. at 264-65. Because the Texas Civil Commitment of Sexually Violent Predators Act is civil in nature, it is not susceptible to an as-applied challenge.

Flicker, 645 F.Supp. 898, 905 (D.N.J. 1986); *see also Cummings v. Charter Hosp. of Las Vegas, Inc.*, 896 P.2d 1137, 1144 (Nev. 1995). This authority is derived from two sources: the *parens patriae* doctrine and the government's police powers. Under the *parens patriae* doctrine, "'the state has a legitimate interest . . . in providing care to its citizens who are unable because of emotional disorders to care for themselves." *Addington*, 441 U.S. at 426; *see also Turner*, 556 S.W.2d at 566 ("The State, as parens patriae undertakes the beneficent task of treating the mentally ill . . . ."); *McGuffin v. State*, 571 S.W.2d 56, 57 (Tex. Civ. App.—Austin 1978, no writ) (noting *parens patriae* duty of the State "to exercise its sovereign power of guardianship over persons under disability"). And under its police powers, the government has "authority . . . to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 U.S. at 426; *see also Heller*, 509 U.S. at 331 (recognizing police-powers authority to protect community from dangerous mentally retarded individuals); *Turner*, 556 S.W.2d at 566 (noting that State's police-power authority to protect the public from harm is a "valid, necessary state objective[] which should not be thwarted").[16]

Pursuant to this historical authority and responsibility, the United States Supreme Court has resoundingly affirmed the constitutionality of civil-commitment statues for

16. The authority and responsibility of governments to treat and care for their mentally disabled individuals stems from common law. *See Heller*, 509 U.S. at 326. Under English common law, "a retarded person became a ward of the King, who had a duty to preserve the individual's estate and provide him with 'necessaries.'" *Id.* In addition, "the King was required to 'provide for the custody and sustentation of [the mentally ill], and preserve their land and the profits of them.'" *Id.*

mentally incompetent individuals. In *Greenwood v. United States*, 350 U.S. 366 (1956), for example, the Supreme Court opined that the involuntary commitment of mentally incompetent individuals falls well-within the confines of constitutional authority:

> The District Court has found that the accused is mentally incompetent to stand trial at the present time and that, if released, he would probably endanger the officers, property, or other interests of the United States—and these findings are adequately supported. In these circumstances the District Court has entered an order retaining and restraining petitioner, while in his present condition. . . . This commitment, and therefore the legislation authorizing commitment in the context of this case, involve an assertion of authority, duly guarded, auxiliary to incontestable national power.

350 U.S. at 375;[17] *see also Heller*, 509 U.S. at 314-34 (affirming constitutionality of Kentucky's involuntary commitment statutes for mentally ill and mentally retarded individuals); *United States v. Salerno*, 481 U.S. 739, 748-49 (1987) (noting that the government may "detain mentally unstable individuals who present a danger to the public and dangerous defendants who become incompetent to stand trial"); *Jones*, 463 U.S. at 370 ("We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution

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17. The United States Supreme Court held that the federal government's authority to involuntarily commit mentally incompetent individuals was "plainly available" under the United States Constitution's Necessary and Proper Clause. *See Greenwood*, 350 U.S. at 375 (citing U.S. CONST. art. I, §8, cl. 18). Although the Act makes clear that sexual-predator civil commitments are not subject to the expert testimony standards of Texas Constitution Article I, §15-a, the State Constitution does specifically authorize civil-commitment statutes. *See* TEX. CONST. art. I, §15-a ("The Legislature may enact all laws necessary to provide for the trial, adjudication of insanity and commitment of persons of unsound mind . . . .").

until such time as he has regained his sanity or is no longer a danger to himself or society."); *Jackson v. Indiana*, 406 U.S. 715, 739 (1972) (holding that if a criminal defendant is incapable of becoming competent to stand trial for crimes, the State must either institute civil-commitment proceedings against the defendant or release him). Not surprisingly, state courts—including the Ninth Court of Appeals in Texas—have uniformly followed suit. *See, e.g., In re Commitment of Martinez*, 98 S.W.3d 373, 376 (Tex. App.—Beaumont 2003, pet. denied) (holding due process does not require competence in civil-commitment proceedings); *In re Detention of Cubbage*, 671 N.W.2d 442, 445-48 (Iowa 2003) (rejecting claim that due process requires a competency hearing prior to sexual-predator civil commitment and noting that there is no "fundamental right to competency in the civil commitment context"); *Missouri v. Kinder*, 129 S.W.3d 5, 10 (Mo. Ct. App. 2003) ("Subjecting a suspected sexually violent predator to a statutory sexually violent predator determination, regardless of competency, is not an unconstitutional deprivation of liberty.").[18]

Despite the universal authority permitting the civil commitment of mentally ill individuals, the court of appeals determined that the State of Texas is *not* constitutionally permitted to civilly commit mentally incompetent individuals. *See Fisher*, 123 S.W.3d at 835-38. Notably, the court engaged in no substantive or procedural due-process analysis to reach its result. *Id.* Had the court applied either due-process framework, it would have

18. *See also State v. Rotherham*, 923 P.2d 1131, 1147 (N.M. 1996) (affirming constitutionality of civilly committing mentally ill individuals and noting that "[a]lthough due process dictates that a state cannot criminally prosecute an incompetent defendant, the State has a compelling interest in committing him [civilly].").

reached the opposite, correct conclusion—that due-process restraints do not preclude States from civilly committing mentally incompetent individuals.

"The Due Process Clause of the Fifth Amendment provides that 'No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." *United States v. Salerno*, 481 U.S. 739, 746 (1987); *see* U.S. CONST. amend. V. The United States Supreme Court has determined that this clause provides two types of protection—substantive and procedural. "'[S]ubstantive due process' prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *Salerno*, 481 U.S. at 746. "Procedural due process" requires the government to exercise fairness when "depriving a person of life, liberty, or property." *Id.* In other words, procedural due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful way.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The State of Texas's civil commitment of mentally incompetent individuals violates neither.

1. Procedural due process does not bar the civil commitment of mentally incompetent individuals.

Because the court of appeals concluded that Fisher's incompetency "to assist his attorney deprived [him] of a meaningful opportunity to be heard," it appears that the court rested its decision on procedural due-process grounds. *See Fisher*, 123 S.W.3d at 838. While the court of appeals correctly determined that Fisher's liberty interests were implicated by the State's civil-commitment proceedings against him, the court incorrectly concluded that

these liberty interests entitled Fisher to all available procedural protections normally afforded in criminal trials. *See generally, id*. at 836-37.

The court of appeals's assumption that civil-commitment statutes must provide all criminal procedural due-process protections is incorrect. To the contrary, the United States Supreme Court has explained that "involuntary commitment does not itself trigger the entire range of criminal procedural protections." *Allen*, 478 U.S. at 372; *see also Middendorf v. Henry*, 425 U.S. 25, 37 (1976) ("[F]act that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment."); *Hendricks*, 521 U.S. at 356 ("The Court has recognized that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context."). Indeed, a number of procedural protections are not constitutionally mandated in civil-commitment proceedings. For example, the constitutionally mandated burden of proof in civil-commitment cases is not the criminal reasonable-doubt standard, but instead is an intermediate "clear" or "convincing" standard. *Addington*, 441 U.S. at 432-33; *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (adopting "clear and convincing" standard of proof in civil-commitment cases). Civil-commitment litigants are also not automatically entitled to invoke the Fifth Amendment privilege against self-incrimination, *see Allen*, 478 U.S. at 375 ("[D]ue process does not independently require application of the privilege [in civil-commitment proceedings]."); *McGuffin*, 571 S.W.2d at 57-59 (rejecting

Fifth Amendment challenge to civil commitment),[19] nor are they constitutionally entitled to a jury trial, *see Sahhar*, 917 F.2d at 1207 ("[W]e conclude that due process does not require a jury trial in a [civil commitment] proceeding."); *French v. Blackburn*, 428 F.Supp. 1351, 1362 n.19 (M.D.N.C. 1977) ("[T]here is not a fundamental right to a jury trial in civil commitment proceedings.").[20] There is not even a consensus among American courts that civil-commitment litigants are entitled to counsel. *See United States v. Baker*, 45 F.3d 837, 848 n.10 (4th Cir. 1995) (noting that Supreme Court has not held that due process entitles counsel at commitment hearing); *Sahhar*, 917 F.2d at 1206 (stating that "an attorney or guardian ad litem need not be appointed to represent an alleged incompetent at a commitment hearing"); *but see Heryford v. Parker*, 396 F.2d 393, 396-97 (10th Cir. 1968) (holding due process requires counsel at involuntary commitment hearing).[21]

Contrary to the court of appeals's judgment, constitutional due-process protections are not absolute in nature—they are applied flexibly to the particular circumstances of each case. *See Jones v. United States*, 463 U.S. 354, 367-68 (1983) ("[D]ue process is flexible and calls

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19. *See also United States v. Sahhar*, 917 F.2d 1197, 1205 (9th Cir. 1990) (recognizing that privilege against self-incrimination does not apply in civil-commitment proceedings because such proceedings are "regulatory, not criminal in nature"); *Commonwealth v. Barboza*, 438 N.E.2d 1064, 1070 (Mass. 1982) (rejecting Fifth Amendment challenge to civil-commitment proceeding); *In the Matter of Baker*, 324 N.W.2d 91, 94 (Mich. Ct. App. 1982) (holding that civil-commitment litigant does not have the right to refuse to testify in commitment proceedings).

20. *Accord Barboza*, 438 N.E.2d at 1069 ("We decline to extend the Sixth Amendment right to a trial by jury to [civil-commitment] proceedings.").

21. Notably, the Legislature's decision to afford some criminal safeguards in civil-commitment proceedings does not "turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there." *Allen*, 478 U.S. at 372.

for such procedural protections as the particular situation demands.") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *Mathews*, 424 U.S. at 334 (noting that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances").[22] Determination of whether a procedure is constitutionally required in a case "requires analysis of the governmental and private interests that are affected." *Mathews*, 424 U.S. at 334. Specifically, the Supreme Court has instructed that the dictates of procedural due process require consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335.[23] And in assuring a proceeding's fundamental fairness, courts must "preserve, so far as possible, the essential elements of the State's purpose." *In re Gault*, 387 U.S. 1, 72 (1967); *see also Sahhar*, 917 F.2d at 1206.

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22. *See also McGuffin*, 571 S.W.2d at 58 (noting that "due process is flexible and calls for such procedural protection as the particular situation demands").

23. *See also Heller*, 509 U.S. at 330-333 (applying *Mathews* test to conclude that due process does not preclude participation of close relatives and legal guardians in involuntary commitment proceedings); *United States v. Baker*, 45 F.3d at 843-48 (applying *Mathews* test to conclude that due process does not prohibit video conferencing of civil-commitment hearing); *Sahhar*, 917 F.2d at 1206 (applying *Mathews* test to determine that the privilege against self-incrimination, the criminal reasonable-doubt standard of proof, the right to representation by counsel, and the right to a jury trial are not constitutionally required in civil-commitment proceedings); *Rotherham*, 923 P.2d at 1147 (applying *Mathews* test in affirming the constitutionality of New Mexico's involuntary commitment statute).

The State's interest in civilly committing dangerous and mentally ill sexually violent predators is two-fold: to protect society from sexual predators, and to treat and care for society's mentally ill citizens. *Addington*, 441 U.S. at 426; *Jones*, 463 U.S. at 368; *Turner*, 556 S.W.2d at 566.[24] Pursuant to its police-power duties, the State should not "release into society an incompetent [individual] who has demonstrated a capacity for serious, violent conduct." *Rotherham*, 923 P.2d at 1147. Accordingly, protecting society and treating mentally ill, dangerous individuals are "valid, necessary state objectives which should not be thwarted." *Turner*, 556 S.W.2d at 566; *Heller*, 509 U.S. at 332 (noting that each State has "a legitimate interest . . . in providing care to its citizens who are unable . . . to care for themselves, as well as . . . to protect the community from any dangerous mentally retarded persons").[25] Indeed, were the law to prohibit civil commitment of mentally incompetent individuals, it would "work a hardship on the individual who has a right to treatment and to society which has a right to protection." *Cf. Turner*, 556 S.W.2d at 566 (quoting *In re Beverly*, 342 So.2d 481, 488 (Fla. 1977)).

By contrast, a civil-commitment litigant's interest in being competent is considerably less than that of a criminal defendant. *See Rotherham*, 923 P.2d at 1147-48. The purpose of the competency requirement in criminal cases is society's concern than an innocent person

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24. *See also Rotherham*, 923 P.2d at 1147.

25. *See also* TEX. HEALTH & SAFETY CODE §841.001 ("[T]he legislature finds that a civil commitment procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state.").

will be improperly imprisoned. *Id.* But the "full force of that concern" is not present in the civil-commitment context because "there are sufficient means by which [an] error may be corrected." *Id.* Because Texas's statute affords several mechanisms for a committed individual to challenge his continued commitment, *see* TEX. HEALTH & SAFETY CODE §§841.101-.124, the risk of harm to an improperly committed individual is considerably minimized. *Cf. Rotherham*, 923 P.2d at 1147-48.

Moreover, "[a]s compared to the goal of a criminal trial, the goal of a commitment hearing is far different." *United States v. Baker*, 45 F.3d at 844 (citing *Vitek v. Jones*, 445 U.S. 480 (1980)). Whereas the goal of a criminal trial is to determine guilt, the goal of a commitment hearing is to determine a person's mental condition "and is based primarily upon the opinions of experts proffered by the government and the respondent." *Id.* at 845. Procedural protections afforded to criminals are much less necessary in the civil-commitment context because the purpose of the inquiry is not to determine guilt or innocence, but instead to determine mental condition. *Id.* ("In short, providing rights to civil commitment respondents less extensive than the counterpart Sixth Amendment rights to which criminal defendants are entitled runs far less risk of erroneous deprivation of liberty than would affording similarly limited rights to criminal defendants."). Consequently, a person's interest in being competent to understand proceedings against him—and to assist his counsel in such proceedings—is far less necessary in the civil-commitment context than in the criminal context.

In addition, Texas's sexual-predator civil-commitment statute already provides those targeted for civil commitment with a number of procedural protections that preserve the fairness of civil-commitment proceedings. For example, an individual targeted for civil commitment under the Act is entitled to a jury trial on demand and an "immediate" examination by an expert. *See* TEX. HEALTH & SAFETY CODE §§841.061(b), (c). The person also has a right to appear at the trial, to present evidence on his own behalf, to cross-examine witnesses, and to view and copy all petitions and reports in the court file. *Id.* §§841.061(d)(1)-(4). The targeted predator has a right to counsel provided by the State, *id.* §§841.005, .144, and is protected by a statutory "beyond a reasonable doubt" standard of proof, *id.* 841.062(a).

In light of these considerable protections and the government's substantial interest in protecting the public and treating mentally ill sexual predators, persons targeted for sexual-predator status under the Act have not been denied "the opportunity to be heard at a meaningful time and in a meaningful way." *Cf. Mathews*, 424 U.S. at 333. The Court should conclude that procedural due process does not preclude the State of Texas from civilly committing mentally incompetent sexually violent predators.

2. Substantive due process does not bar the civil commitment of mentally incompetent individuals.

Subjecting mentally incompetent individuals to civil-commitment proceedings also does not offend substantive due process. Civilly committing mentally incompetent individuals for their own treatment, and for the protection of others, neither "shocks the

conscience" nor "interferes with rights implicit in the concept of ordered liberty." *Cf. Salerno*, 481 U.S. at 746.[26]

The United States Supreme Court has said as much. After noting that the Court has "consistently upheld . . . involuntary commitment statutes," the *Hendricks* Court rejected a litigant's challenge to Kansas's sexual-predator civil-commitment statute, stating, in no uncertain terms: "It cannot be said that the involuntary civil commitment of a limited subclass of [mentally ill] dangerous persons is contrary to our understanding of ordered liberty." *Hendricks*, 521 U.S. at 346; *see also Greenwood*, 350 U.S. at 75 (concluding that civil-commitment statutes are "an assertion of authority, duly guarded, auxiliary to incontestable [government] power").

That the commitment of incompetent individuals does not "shock the conscience" is further buttressed by the interests of the States in pursuing civil commitment of dangerous individuals. As previously discussed, governments have two sources of authority for civilly committing incompetent individuals: *parens patriae* powers and police powers. *See supra* at 24-25. These powers afford governments both the authority and responsibility to treat mentally incompetent citizens. *Id.* Indeed, recognizing the important governmental interests of providing care to mentally ill citizens and protecting the community from dangerous individuals, the Supreme Court of New Mexico affirmed the constitutionality of its involuntary commitment statute, holding that such commitment is not only constitutional, it

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26. *See Rotherham*, 923 P.2d at 1144 (applying *Salerno* test to uphold constitutionality of involuntary commitment statute).

is required: "[T]he State cannot release into society an incompetent defendant who has demonstrated a capacity for serious, violent conduct." *Rotherham*, 923 P.2d at 1147.

Because it is the historical duty and authority of governments to care for and protect society from mentally ill dangerous individuals, it can in no way be said that committing those persons to outpatient treatment and care "shocks the conscience." The State acts in a beneficent capacity when it cares for and treats its mentally ill citizens. *See Turner*, 556 S.W.2d at 566. Accordingly, permitting the involuntary commitment of mentally incompetent individuals does not violate substantive due process.

II. THE COURT SHOULD REJECT FISHER'S FIFTH-AMENDMENT AND VAGUENESS CHALLENGES TO HIS COMMITMENT TO SUPERVISION AND TREATMENT.

Because the court of appeals erroneously determined that mentally incompetent individuals cannot be civilly committed, *see supra* at 13-35, the court did not reach Fisher's two additional arguments against his commitment. *See Fisher*, 123 S.W.3d at 831-32. Fisher argued that (1) his testimony in the civil-commitment proceeding violated his Fifth Amendment right against self-incrimination, and (2) some of his civil-commitment restrictions—and the statutory provisions permitting those restrictions—are void for vagueness. *Id.*; *see also* Appellant's Br. at 17-25. The Court should reject these two additional arguments.

A. Fisher's Fifth Amendment Rights Were Not Violated at his Civil-Commitment Proceeding.

Fisher incorrectly argued in the court of appeals that his testimony in the civil-commitment proceeding violated the Fifth Amendment. *See* Appellant's Br. at 24-25. "The Self-Incrimination Clause of the Fifth Amendment, which applies to the States through the Fourteenth Amendment, . . . provides that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Allen*, 478 U.S. at 368; U.S. CONST. amend. V. In practice, the Fifth Amendment's privilege against self-incrimination provides two essential protections: (1) the right of a defendant to refuse to testify against himself in a criminal trial; and (2) the right of a person to refuse to answer questions in any proceeding "where the answers might incriminate him in future criminal proceedings." *Allen*, 478 U.S. at 368 (citing *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984)). Fisher's testimony violated neither protection.

The first protection of the self-incrimination clause permits defendants to refuse to testify in criminal trials against them. *Allen*, 478 U.S. at 368. On its face, however, this protection affords the right to refuse to testify in criminal proceedings only—not civil trials. *Id.* Because proceedings under Texas's sexual-predator civil-commitment statute are civil rather than criminal, *see supra* at13-24, the privilege to refuse to testify was unavailable. *See Allen*, 478 U.S. at 368-74 (rejecting challenge to Illinois's sexual-predator civil-commitment statute based on Fifth Amendment grounds because the right to refuse to testify does not apply in civil proceedings).

Fisher has not advanced—and therefore has not preserved—any complaint with regard to the self-incrimination clause's second protection—the right not to answer questions that will incriminate oneself in future criminal proceedings. *See* Appellant's Br. at 24-25. Fisher has not directed the Court to any question and answer in his civil-commitment proceedings that could even arguably have subjected him to future criminal liability. *Id.* In addition, Fisher's counsel failed to object to any specific question posed in his civil-commitment proceeding. 2.RR.182-213. As such, any complaint over specific questions and answers is waived. *See Tex. Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 880 (Tex. 1999) (declining to address an argument not made at the trial court); *State v. Boado*, 55 S.W.3d 621, 623 (Tex. Crim. App. 2001) (per curiam) (recognizing "basic principle of appellate jurisprudence that points not argued at trial are deemed to be waived" and that "the trial court cannot be held to have abused its discretion in ruling on the only theory of law presented to it.").

In any event, the State's attorney in Fisher's civil-commitment proceedings did not ask any question that subjected Fisher to future criminal liability. 3.RR.182-213. The State's counsel questioned Fisher on topics including his medications and his prior sexual-assault convictions. *Id.* at 182-88. None of these questions subjected Fisher to future criminal liability. Consequently, Fisher has presented no valid Fifth Amendment challenge to the questions posed in his civil-commitment proceedings. *See Ex parte Renfro*, 999 S.W.2d 557, 561 (Tex. App.—Houston [14th Dist.] 1999, pet ref'd) (noting that unless a person "invokes

the privilege, shows a realistic threat of self-incrimination and nevertheless is required to answer [a question], no violation of his right against self-incrimination is suffered.").

Finally, the United States Supreme Court has squarely foreclosed due process as an independent source for a privilege to refuse to testify in civil-commitment proceedings. *See Allen*, 478 U.S. at 374. According to the Court, "due process does not independently require application of the privilege" in civil-commitment proceedings. *Id.* at 375. Because Fisher's Fifth Amendment challenge to his outpatient treatment and supervision is demonstrably incorrect, the Court should reject Fisher's self-incrimination argument, and render judgment affirming the trial court's commitment order.

B. Fisher's Commitment to Outpatient Supervision and Treatment Is Not Constitutionally Infirm Due to Any Alleged Vagueness in the Civil-Commitment Statute or Fisher's Commitment Restrictions.

Fisher also presented two vagueness challenges in the court of appeals. *See* Appellant's Br. at 17-24. First, Fisher asserted that some of the restrictions imposed by the trial court in his case are unconstitutionally vague. *Id.* at 20-24. Second, Fisher asserted that §841.082 of the Act—which instructs trial courts to impose restrictions on individuals civilly committed under the Act—is unconstitutionally vague. *Id.* at 17-20. Because these arguments were not presented to the trial court, do not present a live case or controversy, and are without legal authority, the court should render judgment against Fisher's vagueness challenges.

Sections 841.082 and .085 of the commitment statute permit judges to impose restrictions on committed persons above and beyond those specifically mandated by the Act. *See* TEX. HEALTH & SAFETY CODE §§841.082(a)(9), .085. In Fisher's case, these restrictions include requiring Fisher to (1) maintain a 1000-foot distance from schools, day-care facilities, and playgrounds, CR.15, (2) provide a blood or hair sample for inclusion in the State of Texas's DNA Data Bank, CR.16, and (3) avoid contact with the victims of his predatory crimes, CR.16. Fisher argues that a great number of his restrictions are unconstitutionally vague, including prohibition against contact with persons under eighteen years of age, *see* Appellant's Br. at 21, prohibition against contact with potential victims as designated by the case manager and treatment staff, *id.*, and prohibition from use of the internet to access sexual material, *id.* at 22.

Fisher's vagueness challenge to his civil-commitment restrictions, however, must fail because Fisher never presented the argument to the trial court. *See Tex. Farmers Ins. Co.*, 996 S.W.2d at 880; *Boado*, 55 S.W.3d at 623. Fisher points to no place in the record where he objected to his civil-commitment restrictions based on vagueness. *See* Appellant's Br. at 20-24. And Fisher refers the Court to no authority permitting an individual to assert a vagueness challenge for the first time on appeal. *Id.* Because the argument was not presented to the trial court, Fisher's vagueness challenge to his commitment restrictions is waived.

Fisher's vagueness challenge is also without merit because it presents no live case or controversy for the court's determination. To bring suit, an individual must have a live case or controversy. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); TEX. CONST. art II, §1, art. I, §13; U.S. CONST. art. III, §2. In the vagueness context, a live case or controversy requires that a person have either been prosecuted for violating a vague statute or have been threatened with such prosecution. *See United States v. Lanier*, 520 U.S. 259, 267 (1997) (noting that the vagueness doctrine "bars enforcement" of a statute that is unconstitutionally vague); *Ellis v. Dyson*, 421 U.S. 426, 434 (1975) ("A genuine threat [of prosecution] must be demonstrated if a case or controversy . . . may be said to exist.") (citing *Steffel v. Thompson*, 415 U.S. 452 , 458-460 (1974)). Fisher asserts neither. *See* Appellant's Br. at 20-24. Indeed, Fisher has presented no evidence in the record or argument in his briefing that he has been criminally prosecuted—or genuinely threatened with prosecution—for the violation of any of the restrictions he wishes to have adjudicated unconstitutionally vague. *Id.* As such, his claims are premature and do not present a live case or controversy for the Court's determination. *See Ellis*, 421 U.S. at 434.

Fisher is, of course, not without recourse for his vagueness complaint regarding any specific restriction. Should the State ever prosecute him for violating restrictions he believes are unconstitutionally vague—or present a genuine threat of such prosecution—Fisher will be able to assert his vagueness challenge. Until that time, however, the Court cannot reach his vagueness concerns because they do not present a live case or controversy. American

jurisprudence simply does not permit a litigant to challenge the vagueness of a statute that is not being enforced against him.

Fisher's other vagueness argument—that §841.082 itself is void for vagueness—also fails. Section 841.082 of the Act instructs trial courts to impose particular restrictions on individuals civilly committed under the Act. *See* TEX. HEALTH & SAFETY CODE §841.082. Specifically, the statute mandates that trial courts prescribe "requirements necessary to ensure the [civilly committed] person's compliance with treatment and supervision and to protect the community" by, among others, "(1) requiring the person to reside in a particular location; and . . . (5) requiring the person to submit to tracking under a particular type of tracking service . . . ." *Id.* §§841.082(a)(1), (a)(5).

Initially, like Fisher's other vagueness assertion, his argument that §841.082 is void for vagueness must fail because it was not presented to the trial court. *See Tex. Farmers Ins. Co.*, 996 S.W.2d at 880; *Boado*, 55 S.W.3d at 623. Fisher refers the Court to no place in the trial court record where he advanced this argument, *see* Appellant's Br. at 17-20, and none exists. As such, the argument is waived.

Moreover, Fisher's vagueness challenge must be rejected on its face because §841.082 imposes no duties on Fisher that could ever be prosecuted. The statutory provision imposes duties on trial courts—not civilly committed persons. Specifically, the provision affords trial courts with the duty to prescribe restrictions when a person has been civilly committed; but the provision does not itself regulate civilly committed individuals. *See* TEX. HEALTH &

SAFETY CODE §841.082. Because §841.082 does not place duties on civilly committed individuals, it could never be enforced against Fisher. Accordingly, Fisher has no live case or controversy to challenge the provision. *Cf. Ellis*, 421 U.S. at 434.

Fisher's assertion that §841.082 is unconstitutionally vague is also incorrect because nothing in the statutory provision is, in fact, vague. *See Lanier*, 520 U.S. at 266 ("[T]he vagueness doctrine bars enforcement 'of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'") (quoting *Connally v. Gen. Contr. Co.*, 269 U.S. 385, 391 (1926)); *cf. Sanders v. State Dep't of Pub. Welfare*, 472 S.W.2d 179, 182 (Tex. Civ. App.—Corpus Christi 1971, writ dism'd) (holding that the use of the term "old" in a regulation was vague.). Instead, §841.082 sufficiently conveys to trial courts their duties under the statute. *See* TEX. HEALTH & SAFETY CODE §841.082.

It appears that Fisher's assertion is not that any specific language in §841.082 is ambiguous, but is instead that the statutory provision gives discretion to trial courts to specify, for example, in which location the committed person must reside. *See* Appellant's Br. at 23-24; *see also* §841.082(a)(1). Constitutional safeguards, however, do not require statutes to precisely prescribe conditions that will be judicially imposed on an individual at a later time. *See United States v. Simpson*, 481 F.2d 582, 584 (5th Cir. 1973) (rejecting argument that statute permitting parole conditions was void for vagueness because it did not specify what particular conditions would be imposed on a parolee); *cf. Reed v. State*, 644

S.W.2d 479, 484-85 (Tex. Crim. App. 1983) (upholding the constitutionality of probation restrictions). Nothing in either the Texas or United States Constitution prohibits the Legislature from affording judicial discretion to prescribe civil-commitment restrictions tailored to a committed person's specific needs.[27]

Moreover, the "vagueness" doctrine applies only when a statute fails to give a person notice that his conduct was prohibited. *See Margraves v. State*, 34 S.W.3d 912, 920 (Tex. Crim. App. 2000) (citing *Bynum v. State*, 767 S.W.2d 769, 773-74 (Tex. Crim. App. 1989)). Under the Act, any restrictions issued by district courts pursuant to §841.082 will be known to a committed sexual predator *prior* to any conduct potentially violating the court's order. *See Beasley*, 95 S.W.2d at 609; *Browning*, 113 S.W.3d at 864 ("Once the court had set out the requirements in its order, Browning had specific notice of what was required."). As in this case, sexual predators subject to civil-commitment restrictions will be on full notice of any restrictions on their future conduct. Until then, any challenge to potential restrictions would be "premature and . . . based on pure surmise and conjecture." *Cf. Simpson*, 481 F.2d at 585. Accordingly, Fisher's assertion that §841.082 is unconstitutionally vague is without logic, authority, and merit.

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27. Fisher's assertion in the court of appeals that Health and Safety Code §841.082(a)(9) unconstitutionally delegates discretion to judges to determine outpatient civil-commitment restrictions is also wholly conclusory and without authority. *See* Appellant's Br. at 23-24. Because this argument was made without briefing and legal authority, it is waived. *See* TEX. R. APP. P. 38.1(h), 38.2(a)(1); *Vickory v. Vickory*, 999 S.W.2d 342, 352-53 (Tex. 1999) (Hecht, J., dissenting from denial of petition for review); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 934 (Tex. 1983).

III. IF ANY PART OR APPLICATION OF THE TEXAS CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS ACT IS UNCONSTITUTIONAL, THE COURT SHOULD PRESERVE THE REMAINDER OF THE ACT.

For each of the reasons discussed above, the Court should reverse the judgment of the court of appeals and affirm the constitutionality of the Texas Civil Commitment of Sexually Violent Predators Act and Respondent Fisher's civil commitment to treatment and supervision under the Act. However, if the Court determines that any provision or application of the Act is unconstitutional, the Court "should sever out the unconstitutional aspects and save the balance of the scheme" because the remainder of the Act can be given full effect. *Cash America Int'l Inc. v. Bennett*, 35 S.W.3d 12, 22 (Tex. 2000); *see* TEX. GOV'T CODE §311.032(c) (noting severability of any invalid provision or application of a statute so long as the remainder of the statute can be given effect without the invalid provision or application). As the Court has recognized, "[i]t would be inconsistent with all just principles of constitutional law" to declare an entire statute unconstitutional because part of it is invalid. *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S.W. 951, 953 (1903).

PRAYER

For the foregoing reasons, the State of Texas respectfully requests that the Court reverse the judgment of the court of appeals and render judgment affirming the trial court's civil commitment of Respondent Michael Fisher to supervision and treatment under the Texas Civil Commitment of Sexually Violent Predators Act.

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I certify that on October 1, 2004 a true and correct copy of this Brief on the Merits was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below:

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